Supreme Court, U.S.
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93-984

CASE NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

ANDRE BERNARD THOMPSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, 9TH CIRCUIT

PETITION FOR A WRIT CERTIORARI

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37 pp

QUESTIONS PRESENTED

Whether the Trial Court ruling and Appellate Court affirmance was error in ruling that the activity resulting in Plaintiff's injury was "incident to military service" and therefore barred by the Feres Doctorine.

Whether the Feres Doctorine or any other theory of governmental immunity should be applied to any activities transpiring at nonappropriated fund instrumentalities (NAFIs) of the United States.

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28 U.S.C. §13-46, 2671-2680

28 U.S.C. §1291

Rule 12(b)(a)(1) of the Federal Rules of Civil Procedure

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, was issued with the proviso that the disposition is not appropriate for publication and has therefore not been reported, a copy of that opinion is, however, reproduced in Appendix A at page A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 30, 1993, (App. A, p. 1). Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Federal Tort Claims Act, 28 U.S.C. §13-46, 2671-2680.

STATEMENT

This action began on May 8, 1991, when the Petitioner submitted an Administrative claim to the Department of the Navy seeking compensation for injuries received while shopping at 24 Area Post Exchange on board camp Pendleton Marine Corp Base. The date of the injury was October 10, 1989. The Department denied the claim on July 25, 1991. On January 23, 1992, Plaintiff filed an action in the District Court for the Southern District of California. On March 23, 1992, Defendant filed a Motion to Dismiss the action or alternatively, for Summary Judgment. Thereafter, Petitioner filed a Motion in Opposition to Defendant's Motion for Dismissal, or, in the alternative, Summary Judgment. On May 14, 1992, Defendant filed a response to Plaintiff's

Opposition to Motion to Dismiss, or, in the alternative, for Summary Judgment. On May 29, 1992, the U.S. District Court for the Southern District of California granted Defendant's Motion to Dismiss pursuant to Rule 12 (b)(a)(1) of the Federal Rules of Civil Procedure. Plaintiff was granted thirty days leave to file an amended Complaint. Plaintiff then filed an appeal to the United States Court of Appeals, Ninth Circuit from the District Court's Judgment dismissing Plaintiff's Complaint for Damages from personal injury. In an opinion dated August 30, 1993, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

The Probate Court of Muscogee County, Georgia, Petitioner's present residence, has appointed his mother as his guardian

in all matters.

On October 10, 1989, the Petitioner, at the time a marine stationed at Camp Pendleton, California, stopped off at the 24 Area Post Exchange. This facility, according to Plaintiff's information and belief, is operated by civilian agents of the United States Marine Corp as part of the nonappropriated fund instrumentalities (NAFIs) of the United States Government. Petitioner was not on duty at the time, rather, he was on liberty. Petitioner reached down to retrieve an item from the bottom shelf of a display, and punctured his eye with a metal display rod affixed to the display wall. The rod passed through the Petitioner's eye, entered his brain, resulting in severe permanent brain damage. As a result of the serious injury, Petitioner was discharged from the

military. Petitioner is unable to care for himself as regards normal daily activities of life: he is unable to hold a job, drive a car, pay his bills, do his shopping, prepare his meals. Petitioner's mother has taken on his daily care, but it is possible that she will not survive him, and his care will have to fall to someone else.

Petitioner, presently thirty-six years old, will be brain damaged for the rest of his life, which, because he is otherwise physically healthy, may continue for another forty years or more. During this time, he will require constant care and supervision.

Reasons for Allowance of Writ

The Federal District Court in the Court of Appeals of the Ninth Circuit have improperly analyzed the position of the Petitioner relative to the Feres Doctorine. Further, the ruling of the United States Court of Appeals for the Ninth Circuit is in conflict with the principles established by the Court in Feres vs. United States, 340 U.S. 135 (1950). Further, the holding of the Court of Appeals for the Ninth Circuit is in conflict with the holdings of the United States Court's of Appeals in other districts as regards the "incident to service" analysis standard which focuses upon three factors:

1. The duty status of the service member;

2. The place where the injury occurred; and,

3. The activity of the serviceman was engaged in at the time of the injury. Kitowski vs. United States, 931 F.2d, 1526, 1528-29(11th Circuit. 1991); Pierce vs. United States, 813 F2d, 349, 353 (11th Circuit. 1987); Parker vs. United States, 611 F2d, 1007, 1013 (5th Circuit. 1980).

In Parker, the 5th Circuit Court of Appeals determined that an off duty serviceman on furlough who was fatally injured by a fellow serviceman within a military installation was not barred from suit by the Feres Doctorine. The sole issue before the Court whether Parker was engaged in activities incident to his military service.

The Court in Parker stated that "one cannot merely state that but for the

individuals military service, the injury would not have occurred. Therefore, it is insufficient to argue that but for Parkers military service, he would not have been at the scene of the collision. More is needed for the activity to be incident to military service". Additionally, in Pierce, (813 F2d at 353, 354) the 11th Circuit made it clear that the mere fact that an individual is in the military "does not mean that everything [a serviceman] does in connection with his personal life can legitimately be considered activity proximately related to military service. To accept the government's contention would be to construe any conceivable personal activity as 'incident to service' because that activity happened to be performed by a member of the armed forces." When this

reasoning is applied to the case at bar, the Court below should have rejected the Respondents argument that the Plaintiff is barred from suit by Feres because but for his military service, he would not have had access to the 24 Area Post Exchange.

The Court in Parker applied a three-prong test in determining whether an injury occurred during some "activity" incident to service. The factorial indicia include:

1. The duty status of the serviceman.

2. The location where the injury occurred.

3. The activity being performed at time of injury.

Upon examining the totality of the circumstances, the Court determines whether the activity was incident to

service. Parker at 1013.

The initial step in determining whether an activity at the time of injury incident to service is to consider the duty status of the serviceman. The Court in Parker, viewed duty status on a continuum, with one extreme being complete discharge while the other extreme is active duty status. Parker at 1013.

On October 10, 1989, Plaintiff was effectively off duty on liberty status. As defined by the Naval Personnel Manual at Section 3030100, the definition of liberty is synonymous with furlough, pass or leave. One on furlough or leave, as in Brooks, normally has an FTCA action. Feres at 1013. In recent cases, various federal courts have found that servicemen injured on pass were not acting "incident to service." Hand vs. U.S., 260 F. Supp.

38, (M.D.Ga. 1966)(servicemen on pass in route to a non military recreational activity was not engaged an activity incident to military service and was not precluded from recovery under the tort claims act). In Pierce vs. U.S., 813 F2d, 349(1987), a serviceman was given permission to leave the base pursuant to an oral request. The 11th Circuit Court of Appeals found that the fact that Pierce was a member of the armed forces assigned to "active duty" the day of the accident, subject to recall; that the fact that he was subject to recall was not dispositive to the duty status issue. Pierce citing Parker, 611 F2d at 1014. A serviceman on furlough may bring an action under FTCA. Brooks vs. U.S., 337 U.S. 49, 69 S.Ct. 918, 93 L. ed 1200(1949). Nevertheless, a serviceman on furlough is also subject to

recall. Pierce citing Parker, 611 F2d at 1014.

These factors are similar to the duty status of the Petitioner in this case. While Petitioner was not actually granted a written leave to be charged against his military personnel record; he was effectively granted time off from his duties. At the time of the incident, Petitioner was not subject to military control, nor was he assigned a military duty. Plaintiff was under no direct supervision of a military superior; he was free to act on or off the military reservation. Under the rationale of Pierce in the 11th Circuit, the Petitioners duty status would not have triggered a Feres bar.

The next factor considered is the location of the incident giving rise to

the injury. As is true in the instant case, in Parker, the injuries occurred on the military base. The Court states that "the occurrence of an on the reservation injury, however; does not immediately trigger application to Feres. If the injury occurred on the base, the court must proceed to the further inquiry of what function the soldier was performing at the time of the injury in order to ascertain the totality of the circumstances." Parker, 611 F2d at 1014. Thus, again in the 11th Circuit the facts of the case at bar would not have triggered a Feres bar for the fact that the injury to the Petitioner occurred on the military reservation. In other cases, where the injury occurred on the military reservation, Courts have allowed FTCA actions. See Hand vs. U.S., 260 F. Supp.

38(M.D.GA. 1966), Lutz vs. Secretary of the Air Force, 944 F2d. 1477(9th Circuit 1991), Brown vs. U.S., 99 F. Supp. 685 (S.D.W.VA. 1951).

These Courts as well as others have concluded that the fact of an on base incident is not determinative, but rather requires further inquiry to be made to assess the total circumstances.

In Parker, the court concluded that once it is determined that the service member's duty status might warrant allowing the action, but that the injury occurred on the base, the court should go further and inquire into precisely what the person was doing when injured. Parker, 611 F2d at 1014.

The final factor in determining whether an activity resulting in injury was "incident to service" is the activity

in which the injured serviceman was engaged at the time of the injury. In Parker, the court considering the act of the serviceman, stated that "Parker was not directly subject to military control, he was not under compulsion of military orders; he was not performing any military mission." Id. at page 1015. Subsequently, the court held that Parker had not engaged in any activity incident to his service.

Similarly, in Pierce, the 11th Circuit rejects the government's argument that Pierce's activity at the time of inquiry was "incident to service." Pierce had run errands and was returning to the base to unpack his personal belongings. The government alleged that these actives were proximately related to military duties because they are part of the life of a soldier. "We disagree, we do not view

pawning a camera, eating lunch, operating a motor vehicle, or unpacking personal property when relieved of assigned tasks as activity materially related to military service." Pierce vs. U.S., 813 F2d at 353. Again, applying this rationale to the case at bar, in the 11th Circuit, the act of Petitioner in shopping for personal items would not have materially related to military service and thus would not have triggered a Feres bar. The fact that Respondent was shopping on a military post exchange facility did not subject him to military orders, duties or discipline in any degree different from a serviceman who elects to shop off base. This activity is clearly not related to military duties.

In a case now pending before the U.S. Court of Appeals for the 11th Circuit, the U.S. District Court for the Middle

District of Georgia, Columbus Division in analyzing the duty status of a serviceman at Ft. Benning determined that one injured in government housing did not trigger a Feres bar. Elliott, Jr., et. al. vs. United States of America, Civil Action Number 91-55-COL(U.S.D.C., M.D.GA.), case no. 93-8027-65 (Ct. of App., 11th Cir.) It is logically inconsistent for one injured in government housing to not trigger a Feres bar, whereas one injured in a government store does trigger a Feres bar. Clearly the military has always assumed a duty to provide quarter for it's members while on the other hand, a military PX certainly does not have the necessity of quarters or the historical precedent for the military to provide to it's soldier's.

This Court should further consider whether any form of immunity should lie

for operations of the nonappropriated fund instrumentalities (NAFIs). Congress has already removed such immunity for actions in contract under the Tucker Act. Under the rationale that those specific categories of military organizations are funded fully by retail activities which renders them solvent and therefore able to support adverse judgments without risk to the general treasury. McDonalds Corporation vs. The United States, 926 F.2d 1126(Fed. Cir. 991). This same rationale is no less applicable to the case at bar.

Indeed, it is the information and belief of counsel for the Petitioner that all NAFIs maintain an insurance policy covering liability for injuries to patrons. This Honorable Court should further consider as have many states that

where a discretionary governmental function undertakes to insure itself against potential liability that any governmental immunity which would otherwise stand is waived to the extent of such insurance coverage by the act of insuring against that liability. Georgia Constitution Article I, §II, Paragraph 9.

CONCLUSION

It is clear that there has been great difficulty in analyzing the applicability of the Feres bar under the three-prong analysis described above. This has resulted in cross circuit inconsistencies in triggering the Ferres bar under any given fact situation. This Court should undertake to review this matter to insure the equal and consistent application of a

Feres bar for any given situation irrespective of where it might arise. Further, this Court should consider whether any form of immunity from action should be had for nonappropriated fund instrumentalities under any circumstances given their insurability and the fact that they are discretionary governmental activities which are fully self funded and capable of supporting adverse judgments without risks to the general treasury of the United States.

Respectfully submitted,
HARP & JOHNSON, P.C.

By: Bert Seth Harp Jr
Bert Seth Harp, Jr.
Counsel for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDRE B. THOMPSON,	)	No. 92-55976
	)	
Plaintiff-Appellant,	)	
	)	D.C. No.
v.	)	CV-92-0117-K
	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM*
	)	
	)	
Defendant-Appellee	)	

Appeal from the United States District Court for the Southern District of California
Judith N. Keep, District Judge, Presiding

Submitted August 6, 1993**
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Before: NOONAN, FERNANDEZ, and KLEINFELD, Circuit Judges

Andre Thompson appeals the district court's dismissal with prejudice of his Federal Tort Claims Act (FTCA) claim for injuries which arose out of an accident on a military base. Thompson, then a member of the United States Marine Corps, seriously injured himself while shopping at the 24 Area Post Exchange (PX) at Camp Pendleton, California, where he was stationed. The PX was under the control of the military. Thompson was on "liberty" (off-duty status) at the time. Rendered totally disabled by the injury, he was discharged. The district court found that it lacked subject matter jurisdiction over his claim because the

Feres[1] doctrine barred claims for injuries to military personnel which occurred in the course of military service.

Thompson first argues that the district court improperly dismissed his complaint under Federal Rule Procedure 12(b)(1). However, we have specifically held that Rule 12(b)(1) is the proper ground for dismissing FTCA claims which are barred by the Feres doctrine. Broudy v. United States, 661 F.2d 125, 128 n.5 (9th Cir. 1981).

We recognize that Thompson is an exceedingly sympathetic claimant and that in the past we have criticized the Feres doctrine. However, our precedent

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[1] Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L. Ed. 152(1950).

squarely bars his tort claim. "The Feres doctrine deprives federal courts of subject matter jurisdiction to decide claims by members of the armed services where the injuries 'arise out of or are in the course of activity incident to service.'" Millang vs. United States, 817 F.2d 533, 534-35 (9th Cir. 1987) (per curiam) (quoting Feres, 340 U.S. at 146, 71 S. Ct. at 159), cert denied, 485 U.S. 987, 108 S. Ct. 1290, 99 L. Ed. 2d 500 (1988). Moreover, in United States v. Johnson, 481 U.S. 681, 687-88, 107 S. Ct. 2063, 2067, 95 L. Ed. 2d 648 (1987), the Supreme Court reaffirmed that the Feres doctrine "has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related

injuries."

The factors bearing on whether injuries are service-related include "the location of the accident, whether the participants were on duty when the accident occurred and the nature of the activities involved." Millang, 817 F.2d at 535 n.2. Related factors are whether the accident happened in an area available to plaintiff "solely by virtue of his status as a serviceman" and whether that area was "under the complete control of the commanding officer." Id. at 535; Bon v. United States, 802 F. 2d 1092, 1095 (9th Cir. 1986).

Thompson argues that although his accident occurred while he was on the military base, the fact that he was off

duty at the time and that he was shopping indicate that his injuries were not service-related. However, it is clear that "[t]he relevant distinction . . . runs between servicepersons who are on 'active duty' and those who have been discharged or are on furlough, not between 'off-duty' and 'on-duty' servicepersons." Persons v. United States, 925 F.2d 292, 296 n.6 (9th Cir. 1991); see also, e.g., Bon, 802 F.2d at 1093, 1095-96. Thompson does not dispute the fact that he had access to the PX only by virtue of his status as an active-duty serviceman. In addition, Thompson alleged that the PX was "a facility operated by and under the control of the United States Government." Although he was given the

opportunity, Thompson made no attempt to amend his complaint to allege that the PX was run by persons outside the ultimate authority of the base's commanding officer.

Nor does the fact that Thompson was shopping (rather than being engaged in a more combat-related activity) serve to bring him outside the Feres doctrine. We have previously found recreational canoeing[2] and picnicking[3] to be service-related. Shopping at a PX is legally indistinguishable. Nor is it necessary that Thompson "specifically challenge a military decision." Millang, 817 F.2d at 535. A lawsuit which challenges the conduct of an on-duty military officer

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[2] Bon, 802 F.2d at 1093.

[3] Millang, 817 F.2d at 534.

"acting within the scope of his authority on military base also challenges the enforcement of military discipline. That is precisely what Feres sough to prevent." Id. By challenging the way in which the government ran the PX, Thompson necessarily implicates the officer in charge of that military facility.

Finally, the facts Thompson alleged do not bring him within any of the limited exceptions to the Feres doctrine which this court has recognized. See Lutz v. Secretary of the Air Force, 944 F.2d 1477, 1487 (9th Cir. 1991) (intentional tortious acts by a service-member); McGowan v. Scoggins, 890 F.2d 128, 139 (9th Cir. 1989) (injuries which are not incident to current

military service).

In short, we recognize that a terrible tragedy has befallen Mr. Thompson. While he does have our sympathy, we cannot offer him solace through the FTCA.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANDRE B. THOMPSON

V.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92-117 K(M)

Jury Verdict This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that a motion to dismiss pursuant to Rule 12(b)(1) of Fed. R. Civ. P. is granted. The Complaint is dismissed with prejudice.

Plaintiff is granted 30 days leave to file an amended complaint.

May 29, 1992
Date

DON HENDRIX
Clerk

KATHERINE MIKLASKI
(By) Deputy Clerk